Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of Amendment of Parts 1 and 63 of the Commission's Rules	)	**IB Docket No. 04-47**

To: The Commission

COMMENTS OF
EXECUTIVE BRANCH AGENCIES

The Department of Justice, including the Federal Bureau of Investigation ("DOJ") and the Department of Homeland Security (DHS), by the undersigned, respectfully submit the following comments regarding the above-captioned proceeding.[1] In its notice, the Commission seeks to develop a fuller record concerning the International Bureau's recommendation to retain current rules that do not exempt non-wholly-owned subsidiaries of Section 214 licensees from obtaining their own authorizations before providing service.[2] The Commission has specifically requested comments on how national security and law enforcement interests may be affected if the rule is modified in certain ways. Id. at ¶ 32. The DOJ and DHS agree with the International Bureau's recommendation and strongly urge the Commission to retain the current rule. The rule is necessary to protect the public interest in preventing entities who may present a risk to

1 *In the matter of Amendment of Parts 1 and 63 of the Commission's Rules*, IB Docket No. 04-47 at ¶¶ 27-32 (rel. March 4, 2004) ("NPRM").

2 In the same NPRM, the Commission also seeks comments on a number of other matters; however, the undersigned agencies limit their comments to the issue of Section 214 authorization for non-wholly-owned subsidiaries.

national security or law enforcement interests from providing service pursuant to a parent entity's Section 214 authorization. Elimination of the rule would significantly and adversely impact our ability to safeguard national security and critical law enforcement concerns – at the very time when we are striving to identify and plug any gaps in our national security.

DISCUSSION

The United States Court of Appeals for the District of Columbia recently upheld the Commission's earlier decision to continue to require separate Section 214 authorizations for non-wholly-owned subsidiary carriers and their parent companies. Cellco Partnership v. F.C.C., 357 F.3d 88, 102-03 (D.C. Cir. 2004). The D.C. Circuit explicitly found that the rule was justified in light of: (1) the Commission's obligations to ensure that authorizations are granted only where they serve "public convenience and necessity," and (2) the Commission's statutory duty to notify the Secretaries of Defense and State of Section 214 applications for consideration of potential risks associated with foreign affiliations.[3]

In its 2002 report, the International Bureau again found that the rule remains necessary to protect the public interest. The International Bureau found that no new arguments against the rule have been offered that would warrant a change in the rule. NPRM at ¶ 31. Accordingly, the International Bureau again recommended against

[3] Although not specifically noted by the Court of Appeals, the Commission has for some time also provided notice of Section 214 applications to, and considered the views of, other agencies, including the signatories hereto, as part of the public interest review. See 2002 IB Biennial Regulatory Review Staff Report, 18 F.C.C. Rcd. at 4237-38, ¶ 22 (noting that "the Commission defers to Executive Branch agencies on national security, law enforcement, foreign policy, and trade policy concerns raised in an application").

repealing or modifying the rule. *See 2002 IB Biennial Regulatory Review Staff Report*, 18 F.C.C. Rcd. at 4237-38, ¶ 36.

The D.C. Circuit and the International Bureau are both correct that the rule is necessary to allow consideration of whether it is in the public interest that a person or entity be allowed to provide Section 214 services before such services commence. The rule preserves the Commission's ability to prevent parties who should not possess Section 214 authorizations from obtaining them indirectly, *i.e.*, by obtaining non-controlling interests in subsidiaries of licensees. As the Commission has long recognized, among the entities that should not possess Section 214 authorizations are parties who present a risk to the national security or law enforcement interests of the United States, a decision entrusted to Executive Branch agencies such as the signatories hereto. *See 2002 IB Biennial Regulatory Review Staff Report*, 18 F.C.C. Rcd. at 4237-38, ¶ 22. The DOJ and DHS rely on the Section 214 application process for notice of and information about applicants who may pose potential national security and law enforcement risks.

The Commission also requested comment on "whether there is a maximum percent of differing ownership that should be allowed, e.g. 10 percent, 20 percent, before a subsidiary would be required to obtain its own authorization . . . ." NPRM at ¶ 32. While such a bright-line rule may be appealing for administrative reasons, national security and law enforcement interests cannot be adequately protected if all risks other than those created by a particular percentage ownership are excluded. Determinations of whether a licensee poses a threat to national security or law enforcement interests are done on a case-by-case basis and are extremely fact dependent. Percentage ownership is only one factor among many that must be considered. For instance, the National

Industrial Security Program Operating Manual lists eleven separate considerations that impact the potential risk calculation, and even this list is not exhaustive. *See* National Industrial Security Program Operating Manual ("NISPOM"), Sec. 2-302 (DOD 5220.22-M). Treating percentage ownership as the exclusive, and controlling, consideration ignores the many other factors that contribute to the analysis.

The Commission also asks "[w]ould a requirement that a subsidiary notify the Commission within 30 days after beginning to provide service under its parent's authorization . . . alleviate or diminish [*inter alia*, national security and law enforcement] concerns." NPRM at ¶ 32. It would not. As the FBI noted in its comments during the 1998 Biennial Review, Section 214(b)'s requirement that Executive Branch agencies have a right to be notified and heard regarding Section 214 applications demonstrates Congress' intent that these agencies weigh, *inter alia*, national security and law enforcement concerns, before a carrier begins to provide service. Comments of the Federal Bureau of Investigation, IB Docket No. 98-118, at 4 (August 13, 1998). Such a requirement of prior consideration - before risks can materialize into actual damage - is prudent where interests as important as national security and law enforcement are at stake. It would be unacceptable to grant a 30 day "grace period" within which national security and law enforcement interests may be placed at risk without either prior examination by the Commission or an opportunity for consideration of Executive Branch agency views.

CONCLUSION

The DOJ and DHS strongly encourage the Commission to accept the International Bureau's recommendation to retain the current rule that requires non-wholly-owned

subsidiaries of Section 214 licensees to obtain authorization separately from their parent companies. As the International Bureau, the Court of Appeals for the D.C. Circuit and the Commission have all recognized, the rule is necessary to allow review of such applications for, among other things, national security and law enforcement concerns prior to the commencement of service.

[SIGNATURE PAGE FOLLOWS]

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Respectfully submitted,

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